IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 422 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
YUNUS DAUD JOGIYAT & 1 - Opponent(s)

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Appearance :

MR ND GOHIL, ADDL. PUBLIC PROSECUTOR for Appellant(s) : 1,
MR KB ANANDJIWALA for Opponent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 19/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. The present Criminal Appeal is filed by the State of Gujarat under section 378 of CrPC against the impugned

judgment and order of acquittal passed by the ld. Addl. Sessions Judge, Bharuch on 24.12.1985 in Sessions Case No.3/1985, whereby the ld. Trial Judge had acquitted the respondents accused from the charges of the offences punishable under sections 302, 376 and 114 of Indian Penal Code.

2. The State has assailed the impugned order of acquittal on various grounds stated in the memo of the appeal, but mainly the say of the appellant State is that the order of acquittal passed by ld. Trial Judge is perverse and is based on incorrect appreciation of the oral as well as documentary evidence led during the trial. Ld. Trial Judge has committed gross error in not accepting the version of three eye-witnesses examined by the prosecution and other relevant circumstances emerging from record and evidence led by the prosecution. The ld. Trial Judge has considered various aspects while recording the acquittal of the accused.

3. The ld. APP Mr. ND Gohil appearing for the appellant State has taken us through the judgment under challenge. To appreciate the stand taken by the appellant State, it would be proper for us to narrate the facts of the case in brief;

(i) An offence came to be registered in the present case on the complaint filed by one Mohmed Hanif Ahmed Bera, resident of Village Kharod, Ta: Ankleshwar- real brother of deceased Farida. This Farida is also known as “Gori” (having fair whitish skin) and, therefore, the deceased Farida is referred by the witnesses as Gori and the ld. Trial Judge has also, at some places, has referred the deceased Farida as Gori. She was about 14 years of age on the date of incident i.e. 20.10.1984. The complainant, in the evening hours, was lying on his cot at his home when he was informed about the non-return of Farida who had gone in the sim of village Kharod to collect cow-dungs. Suraiya-sister of Farida was also at home and she informed the complainant about the non-return of Farida and therefore, they started searching deceased Farida. On the date of incident, deceased Farida and two prosecution witnesses namely Johra and Nafisa- girls practically of same age group, had gone to Baniavagha area to collect cow-dungs. It appears that said area was mostly used for grazing the cattle of the village and therefore, it was easy for the village girls to collect cow-dungs from that area and these three girls had gone to said Baniavagha area at about 3.00 p.m. P.W. Rupchand,servant of Mohmed Bhaiyat, probably serving as

a cattle-grazer, had also gone to the said area on that day to graze the cattle of his master Mohmed Bhaiyat and he was also there. All the three girls had returned from Baniavagha area after collecting cow-dungs. When they had gone at Baniavagha at 3.00 p.m., both the accused i.e. respondents herein were present there and they had attempted to converse with the girls. Description of the clothes put on by the accused was also available with the prosecution.

(ii) After return of these girls from Baniavagha, Farida had expressed her wish to go again to Baniavagha for collecting some more cow-dungs and she was advised by her two friends i.e. Johra and Nafisa that she should not go alone and thereafter both the girls i.e. Johra and Nafisa returned to their respective homes. It is the say of the prosecution that both the girls Johra and Nafisa had again gone to Baniavagha to collect cow-dungs at about 5.00 p.m. and when they reached near the Bank of creek popularly known as " Bhadiwali Khadi", they show the accused persons pulling Farida and they were telling her to accompany them and Farida was refusing to go with them. Thereafter, she was dragged by the accused persons. It is the case of the prosecution that at that time,

Farida had put on Ijar (kurta) and frock popularly known as Punjabi Dress. Accused No.1 caught hold of the hands of Farida and pressed her mouth and accused No.2 caught hold of her legs and both the accused lifted Farida and took her to the Bhadiwali Khadi. It is the prosecution case that both these girls i.e. Johra and Nafisa as well as prosecution witness Rupchand who was grazing cattle there, chased the accused and thereafter they stood on the bank of Khadi and saw the incident. It is the prosecution case that Ijar put on by Farida was forcibly removed and she was raped by accused No.1. The accused No.1 had put on Lungi and he removed his Lungi to commit the rape. To prevent the shouts to see that resistance of Farida does not reach to anybody, accused No.1 with the help of accused No.2, throttled the neck by hands till her death. According to the prosecution, for throttling the neck of Farida, accused No.1 used one string (nylon-synthetic string) which was asked by him from accused No.2 who in turn gave it to accused No.1 and which muddamal article was ultimately recovered by the Investigating Officer and was produced before the ld. Trial Judge as Muddamal article No.4. It is the prosecution case that all these three witnesses have witnessed the entire incident i.e. sexual assault on

Farida and thereafter, murder of Farida. It is the prosecution case that thereafter, these witnesses were threatened by the accused persons not to tell about the incident else they would be killed and thereafter accused ran way from the place of incident. That thereafter, both the girls i.e. Johra and Nafisa had returned to their respective homes and prosecution witness Rupchand had returned to his master's house with cattle and thereafter, he left for one another village Pardi situated just adjacent to his village Kharod where sister of this witness is residing. He stayed with his sister.

(iii) According to the prosecution, the brother of the deceased Farida who is complainant, along with neighbours and about 25 village people, started searching Farida in the evening of 20.10.1984 and that dead body of Farida was found lying in Bhadiwali Khadi. Ultimately, the police was informed and offence came to be registered. Dead body of the deceased girl Farida was brought to her village and at his residence on a pony. Dead body of Farida was kept during night hours and complainant Mohmed Hanif thereafter went to Ankleshwar police Station on a motor cycle of one Siraj Motala and lodged his complaint

(exh.24) at 9.45 p.m. i.e. 21.45 hours on 20.10.1984. It was a strong belief of the complainant that her sister Farida is murdered after commission of rape on her.

(iv) On filing of the complaint, the police started investigation. PSI of Ankleshwar Police Station namely Mr. UD Parmar came to village Kharod, took the custody of the dead body lying in the house of the complainant and attempted to collect the facts regarding the incident and names of suspects or assailants etc. He had inquired from Johra and Nafisa. It is the say of the prosecution that both Johra and Nafisa did not disclose the names of the accused persons as assailants as they were given threats by the accused persons. It is the say of the prosecution that in the early morning at about 3.00 a.m., the names of the accused were disclosed to the relatives of Farida. PSI Mr. Parmar drew inquest panchanama of the dead body between 7.30 & 8.30 p.m. and also a panchanama of the scene of offence. Medical Officer performed autopsy and it was found that neck of deceased Farida was throttled and a rape has also been committed on her. During the course of investigation, the police had recovered clothes of the deceased as well as of accused persons including the lungi that accused No.1 had put on at the time of

commission of offence. At the conclusion of investigation, police chargesheeted both the accused persons for the offences punishable under sections 302, 376 & 114 of the Indian Penal Code. Thereafter, Ankleshwar Police committed the case against the accused persons to the Court of Sessions at Bharuch.

(v) It is necessary to mention that after committal of the case to the Court of Sessions, accused No.2 submitted an application before the ld. Sessions Judge, Bharuch requesting to tender pardon to him by making him approver and the ld. Sessions Judge sent the said application of accused No.2 to the ld. Chief Judicial Magistrate, Bharuch for taking necessary action and for granting pardon to accused No.2. The ld. Chief Judicial Magistrate thereafter granted pardon to accused No.2 on the strength of the disclosure of truth and real facts of the incident that had occurred at Baniavagha wherein girl Farida was raped and murdered. Accused No.2, accepting the pardon, has expressed his willingness to give necessary police statement and his statement under section 164 of CrPC ultimately came to be recorded by the ld. Chief Judicial Magistrate, Bharuch. The application made before the ld. Sessions Judge to grant pardon and

the willingness expressed by accused No.2 that he is ready to become a witness, are there on the record as mark B & C. The ld. Chief Judicial Magistrate, after recording statement of the accused No.2 on 26.02.1985, granted pardon under section 306 of CrPC and therefore, he was to be examined as a witness and the trial was to be proceeded against accused No.1.

(vi) The trial Court ultimately framed the charge vide exh.5 against accused No.1 for the offence punishable under sections 302 & 376 of IPC and on denial of the charge, trial was commenced. Accused No.1, thereafter, challenged the order passed by the ld. Chief Judicial Magistrate, granting pardon to accused No.2 and this Court, ultimately allowed the said application of accused No.1 and quashed and set aside the order granting pardon to accused No.2. As the order granting pardon was turned down by this Court, the accused No.2 was supposed to be tried jointly with accused No.1 and, therefore, the ld. Trial Judge, after hearing the parties and considering the police papers, altered the charge and framed the charge against both the accused persons for the offences punishable under sections 302, 376 & 114 of Indian Penal Code.

(vii) The prosecution, thereafter, led oral as well as documentary evidence and the ld. Trial Judge, thereafter recorded statement of the accused persons under section 313 of CrPC putting pointed questions as to the incriminating evidence recorded against them. At the end of trial, ld. Trial Judge, vide impugned judgment and order, acquitted the respondents accused from the charges leveled against them.

4. The ld. Trial Judge has appreciated medical evidence in the background of the version placed by the three eye-witnesses examined by the prosecution and ultimately held that the evidence of none of these three eye witnesses is reliable. It is also held that none of these eye witnesses can be said to be an eye witness to the incident either of rape or of committing murder and all the three have been disbelieved by the ld. Trial Judge. For rejecting their evidence, the ld. Trial Judge has assigned various reasons and if they are stated in brief, they are :-

(i) At the relevant time and place when alleged offence was being committed, the presence of all these witnesses was not there at the scene of offence.

(ii) There are circumstances to show that these witnesses have been got up witnesses and practically there is nobody who can be said to be an eye-witness to the incident.

(iii) The conduct of all the three witnesses at the time of commission of offence is highly unnatural as well as their conduct subsequent to the incident allegedly seen by them is also contrary to the normal human conduct, especially when Johra and Nafisa were the friends of deceased Farida and they were practically of the same age group.

(iv) Non-disclosure of the names of the accused by Johra and Nafisa both for a long time, is sufficient to raise doubt as to their presence at the scene of offence.

(v) Injuries found by the doctor on the body of the person deceased does not corroborate the say of the eye-witnesses that a synthetic (nylon) string was used for throttling the neck of the deceased and that too after commission of the rape.

(vi) The time factor materially runs against the theory placed by the prosecution especially in the background of the distance between the residential house of Nafisa, Johra and Farida and the place where they had gone to collect the cow-dungs.

(vii) The conduct of Rupchand is highly unnatural and there is material contradiction as to presence of both the accused persons in Baniavagha when all the three girls had reached to collect the cow-dungs at about 3.00 p.m. because the say of Rupchand is that at that relevant point of time when girls were there to collect the cow-dungs firstly, the accused persons were not there and on the other hand, the say of Johra and Nafisa is that both the accused were there and they had some conversation with the accused persons.

(viii) The version of the Circle Inspector examined by the prosecution at Exh. 16 if is accepted, then it is not possible to believe that the scene of offence was visible from the place from where these three witnesses had witnessed the incident in question.

(ix) The allegation that all these three witnesses were threatened by the accused persons is not found convincing.

(x) That witness Rupchand is a planted witness, is the inference drawn by the ld. Trial Judge and his conduct qua his master or family members of the master on his return after grazing the cattle is not natural as well as the family members of his real sister residing at adjacent village Pardi is also not found natural.

(xi) Johra and Nafisa at least were able to point out the place where the offence was committed and there was no need to shout for Farida during the night hours by villagers and family members of Farida including her brother especially when Nafisa was accompanying this group of persons.

(xii) Nafisa when accompanied Suraiya at initial hours of late evening to disclose the incident without naming the accused persons, this was the first available opportunity to Nafisa which she did not avail.

(xiii) Statement of Rupchand has been recorded at a very late stage and at a very developed stage of investigation though he was available at the adjacent village Pardi and delay caused in recording his statement has not been properly explained by the prosecution.

5. Over and above the reasons assigned for not accepting the version of the above-said three witnesses, the ld. Trial Judge has also appreciated other aspects which were found relevant. These aspects are:-

(i) No injury on genital organs of the accused No.1 was noticed when examined by the doctor. Normally when forcible intercourse is made with a teenager girl of

about 14 years, it may result into some injury on the genital organs of the accused.

(ii) When it is the case of the prosecution that semen was found in the vagina of deceased Farida, it is possible to infer that the rape was actually committed. Even than, the lungi put on by accused No.1 recovered during investigation and identified by the eye-witnesses, was not found stained with semen during the analysis by Forensic Science Laboratory (FSL for short).

(iii) The medical evidence contradicts the basic proposition of the theory placed by the prosecution such as use of synthetic string to throttle the neck and strangulate the girl Farida.

(iv) The confessional statement of accused No.2 can not be read as substantive piece of evidence in favour of the prosecution because of the basic legal infirmities and retracted statement even otherwise is of very little value in the eyes of law and therefore, it is not sufficient to link accused No.1 with the crime and it would not be useful to hold accused No.2 guilty of the offence in the capacity of the abettor or a person carrying common intention with accused No.1.

(vi) The say of the ld. Trial Judge is that the case of the prosecution should substantial stand on its own legs

as placed before the Court and the evidence led by the prosecution should be cogent. Unless the Court is able to record a finding that there is no possibility to draw the inference other than the guilt of the accused, only then, the accused should be held responsible for a criminal wrong. The ld. Trial Judge, while recording a finding that it is not safe to draw inference of guilt, has discussed the evidence led by the prosecution witnesses in detail mainly in paras 5 to 11 of the judgment, including the details reflected in the inquest panchanama and the evidence of doctor, autopsy report and also the evidence led by one prosecution witness who has allegedly seen the accused persons coming towards the village running at about 5.00 to 5.30 p.m. in the evening.

6. The ld. APP Mr. Gohil appearing for the appellant State has submitted that the findings recorded by the ld. Trial Judge are erroneous and are based on incorrect appreciation of evidence. There was no reason to disbelieve these three witnesses especially when there are no material contradiction. The ld. Trial Judge has tried to magnify the minor contradictions made by this witness by citing one decision of the Apex Court in the

case of **Bharwada Bhoginbhai Hirjibhai v/s State of Gujarat, AIR 1983 SC 753,** and submitted that the Court should not give undue weightage to the minor contradictions. We would like to quote the part of the decision relied upon by ld. APP Mr. Gohil:-

> ".....The finding of guilt recorded by the Sessions Court as affirmed by the High Court has been challenged mainly on the basis of minor discrepancies in the evidence. We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :-
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> (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed an the mental screen.
>
> (2) Ordinarily it so happens that a witness is overtaken by events, The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
>
> (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
>
> (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the

moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

According to ld. APP Mr. Gohil, this is not a case of a solitary eye-witness. Three witnesses have corroborated each other. On the contrary, the ld. Trial Judge ought to have held that the story unfolded by these witnesses of the commission of rape, gets corroboration from the medical evidence because it is said by the doctor that the rape on the girl Farida was committed. The injury found on the body of the accused No.1 i.e. teeth bite marks noticed by the doctor, has not been properly appreciated and a false explanation given by the accused No.1 regarding this injury found on his

fore-arm, is sufficient to link the accused No.1 with the crime. Opinion of the doctor is clear that it is not necessary in all cases that the corresponding teeth marks on opposite side in semi-circular form are also found on the person accused. The doctor has opined that the injury found on the present accused i.e. accused No.1 was the bite marks and the accused has attempted to explain that he sustained this injury when he was driving auto-rickshaw. This false explanation gives an important clue or circumstance against the accused No.1 and in such a situation, the ld. Trial Judge ought not to have ignored the version of at least two eye witnesses namely Johra and Nafisa. It is in evidence, according to ld. APP Mr. Gohil, that these three girls were often visiting the sim of village Kharod and therefore, their presence in the company of Farida was not unnatural. So, both of them had disclosed their intention to go second time to collect cow-dungs, even then they might have decided to go again considering the fact that Farida must be alone and lonely in the said area. It appears, according to ld. APP Mr. Gohil, that the ld. Trial Judge has started assigning reasons presuming the innocence of the accused merely because the medical evidence as to the commission of rape by accused No.1 was not led by the prosecution.

The fact that the prosecution has examined doctors at initial stage, evidence led by these witnesses ought not to have been viewed with doubt and the ld. Trial Judge has given undue weightage to the certain improvements made by these witnesses. The conduct of an individual, according to ld. APP Mr. Gohil, may very from a person to person. On account of some surprising or strange behaviour of a witness, such witness should not be discarded and it is not either legal or proper to hold that such a witness is telling lie.

7. According to Mr. Anandjiwala, ld. Counsel appearing for the respondents accused, the findings of the ld. Trial Judge are absolutely legal and based on the basic principles of criminal jurisprudence. It is not necessary for this Court to assign reasons and by adopting the reasons assigned by the ld. Trial Judge, this Court can dismiss the acquittal appeal filed by the State. By referring contradictions made by these three witnesses, and the improvements made by them, it is argued by ld. Counsel Mr. Anandjiwala that it was not possible for the ld. Trial Judge to say that any of these three witnesses had seen even a part of the said incident. It appears that when deceased Farida was lonely in baniavagha area

or in Bhadiwali Khadi, she was victimised and raped and the accused who committed rape might have throttled her neck by hand or while committing rape, undue pressure might have been given on the neck to prevent the shouts of minor Farida, which might have resulted into the fracture of delicate bones of neck, resulting into respiratory obstruction and in turn death of the deceased Farida. The ld. Trial Judge has rightly focused on the conduct of these witnesses and the story placed by the prosecution that under threats, they were not able to disclose the actual offending act immediately after the commission of rape and murder and the ld. Trial Judge has rightly said that it is difficult to swallow this theory because all the three witnesses were safe, comfortable and two of them even were persuaded by their relatives as well as by PSI Mr. Parmar to disclose true facts. However, none of these witnesses have tried to disclose the offending act without naming the accused when it was not impossible for them to do so. They had neither disclosed the fact that they had seen ghastly act and they could have given names of the accused and it was also possible for them to even narrate the approximate time of the incident. When version of these three witnesses is not even corroborated by medical evidence,

their evidence has been rightly rejected by the ld. Trial Judge. While appreciating the evidence, the version of each witness requires to be scanned closely and the attempt to modulate the theory in accordance with medical evidence led by the prosecution, creates more doubt. Our courts have condemned those witnesses who attempt to modulate the version by making some improvement so as to get corroboration from opinion evidence. The theory placed by these witnesses that the deceased was throttled by hands is a very material improvement against th basic story placed by the prosecution. Undisputedly, there is no allegation that accused No.2 has also committed rape on girl Farida. The ld. Trial Judge is asked to believe that three persons have witnessed the incident jointly and practically in a standing position from one spot and all the three went to their way and remained silent for several hours. However, by assigning reasons, the ld. Trial Judge has not accepted this theory placed by the prosecution, not only on the conduct of these witnesses but when it was found that the version/theory placed by the prosecution is not even supported by the medical evidence and time factor viz. as to actually time of commission of the offence. In response to the query raised by us in the background of submissions made by

ld. APP Mr. Gohil that what would be the effect of false explanation given by accused No.1 as to the teeth bite mark injury found on the body of the accused No.1, ld. Counsel Mr. Anandjiwala for the respondents accused has submitted that non-explanation of injury found or one explanation which can not be said to be satisfactory or convincing, should not be equated with the false explanation. Placing reliance on the observations made by the Apex Court in the case of **Sharad Birdhichand Sarda v/s State of Maharashtra, AIR 1984 SC 1622,** it is submitted by ld. Counsel Mr. Anandjiwala for the respondents accused that it is well-settled that the prosecution must stand on its own legs and it can not derive any strength from the weaknesses or the defence. Mr. Anandjiwala has agreed that false explanation can be used against the accused, but according to Mr. Anandjiwala, the observations made by the Apex Court in the decision of Sharda Birdhichand Sarda (supra) would help the respondents accused, wherein the Apex Court has observed that :

> “158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following

essential conditions must be satisfied :

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus :

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

8. It is argued by ld. Counsel Mr. Anandjiwala that a pointed question was asked to the doctor during the course of cross-examination by the ld. Counsel defending the accused No.1 as to the age of injury of teeth bite marks found on the body of the accused No.1 and according to the doctor, the injuries of teeth bite were in semi-circular form and they were all on upper 1/3rd of the left arm. They were reddish in colour and five teeth bite marks were seen. He has said “the injuries must be

within 12 hours from the time of my examination.” The doctor has further said that beyond 12 hours, the colour of the injury would be reddish blue. Accused No.1 was taken to Civil Hospital, Bharuch at 8.30 p.m. on 21.10.1984 viz. practically after about 24 hours and so it was possible for the doctor to opine that the injuries seen by him of bite marks were old by more than 24 hours if the incident had really happened at any time between 17.00 to 18.00 hours on 20.10.1984. So, it is not safe to link the accused with the crime merely because bite marks are seen during the examination of accused No.1 by P.W.3 Dr. Kamlesh Rathod. Here, we would like to quote some of the comments made by Dr.Modi in his book ***Modi's Medical Jurisprudence & Toxicology, 23rd Edition,*** which according to us, are relevant:-

(i) “ The tooth bite marks can be produced by the objects with a tooth-like edge, such as saws and sharpened combs or any article grouped as tooth-marks. “ In the present case, the semi-circular tooth marks found on the body of the accused, has not been evaluated in a satisfactory manner by ld. Trial Judge, but the totality, in the background of the legal position, is not able to carry the case of the prosecution any further. As

observed by Dr. Modi, it is better to take clear photographs and get an opinion of a forensic odontologist, who is often able to give an opinion on the pattern of the teeth in the mouth of the assailant. A measuring scale should be included near the bite mark while photographing." In the present case, no such exercise has been done.

(ii) There is no convincing or satisfactory evidence available as to the age of the wound i.e. bite marks found. Undisputedly, it is possible to opine as to the age of the wound or injury like teeth mark or abrasion. As per Dr.Modi, if the injury is fresh, no scab and red in colour, if the injury is old by 12-24 hours, there would be Dark red scab, if the injury is old by 1-2 days, there would be Brownish red scab, if the injury is old by 3-5 days, there would be Dark Brownish red scab and if injury is old by 5-7 days, there would be Peripheral healing with shrinkage of the scab.

No such evidence is available. In absence of evidence as to the depth of the teeth mark, according to us, the pattern of such injury is possible to be compared with the abrasion found on a human body. According to Dr. Modi, it is true that the medical science has not yet

developed any process by which the exact duration of injuries may be determined. There is always a margin of a few hours on either side in the estimate given by a doctor about the duration of the injuries.

However, according to us, this margin would not be more than an hour or two if injury is fresh. This margin comparatively may be higher if the injury is old by more than 24 hours. As held by the Apex Court in th case of **Ishwarsingh v/s State of UP, AIR 1976 SC 2423,** "it is the duty of the prosecution, and not less of the Court to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes cause aberration in the cause of justice."

In the present case, the accused can be equated with victim with reference to the the nature of injury found on his person so as to link the accused with the crime and as per the rule of the best evidence, the prosecution could have collected evidence to show that bite marks found on the forearm of the accused No.1 is of deceased Farida only. It emerges from the record that the dead body of the deceased was very well there in the

hospital up to 12.00 noon and accused appears to have been apprehended in the afternoon because the formal arrest panchanama has been drawn in presence of panchas having detailed description from 16.00 onwards. So, it was not impossible for the investigating agency to link the accused with the injury found and teeth pattern of deceased Farida. It is not easy to give exact time of infliction of injury, but an approximate time can be given from the data available. Hence, it is always necessary to mention “about” when giving the period of a injury or the age of injury. That in the certificate of the injury in the present case, no such opinion has been expressed by the doctor. During the cross-examination, it appears that the opinion as to the age of teeth mark injury is given by the doctor on the basis of the observations made by the doctor and the stage of healing process and a reasonably good doctor having some experience, is able to opinion satisfactorily qua the age of injury. As per the study made by the expert, the age of the injury is normally being assessed on the basis of change in colour of the injury and this change commences from 18 to 24 hours after its infliction. The respondent No.1 accused was examined in the late evening on 21.10.1984 i.e. after about 24 hours from the time of

commission of the offence as per the case placed by the prosecution. So, it was possible for the doctor to say that the injury was old by more than 24 hours. No such opinion is expressed. On the contrary, the answer given by the doctor during the course of cross-examination is capable of creating doubt. The time of commission of rape, according to the prosecution, was some where between 4.30 to 5.30 or latest by 6.00 p.m. on 20.10.1984. The absence of alive sperms strengthens this doubt because as per the say of Dr. Rashmikant Mehta, sperms in vagina remains alive for more than about 24 hours after intercourse even if the victim dies. The sperms start dying after 24 hours. When the autopsy was performed after 24 hours from the time of alleged commission of rape, it would be risky to link the accused with the crime. The autopsy and other procedure performed on the person of the present deceased Farida, was between 10.00 a.m. & 12.00 noon on 21.10.1984 i.e. within 18 to 19 hours.

(iii) As per Dr. Modi's Jurisprudence & Toxicology, the doctor could have advised the investigating officer to collect semen of the accused so it can be compared with vaginal swab or slide serologically through FSL.

However, no such exercise has been done in the present case.

(iv) Smegma accumulates if no bath is taken for 24 hours. In the present case, smegma was found absent though the accused was examined by the doctor after 24 hours from the time of commission of alleged rape. The ld. Trial Judge has not asked a pointed question while recording statement of the accused under section 313 of CrPC that what accused has to say about absence of smegma and therefore, the observations made by the doctor as to the absence of smegma can not be used for drawing any inference against the accused. We have considered these aspects in the background of the opinion given by the doctor whereby he has said that there were no external injuries on external genitals and there was no any visceral or serous stains found on pubic region, inner aspect of both thighs or on penis. This part of evidence, if considered,it would be difficult for us to reverse the acquittal recorded by the ld. Trial Judge.

The above comments of the expert as well as findings recorded by the ld. Trial Judge while commenting on the age and colour of the injury on accused No.1, have

been placed before us by ld. APP Mr. Gohil.

9. In response to this submission made by Mr. Gohil, ld. Counsel Mr. Anandjiwala for the respondents accused has argued that the doctor ought to have been put certain questions by seeking permission for re-examination or he could have been recalled for the purpose. The Medical Jurisprudence or any comments made by the expert on the subject can not be read as substantive piece of evidence or opinion expressed in a given case, unless a pointed question is put either to the doctor or to the expert, such comments quoted above would not be of any assistance qua not accepting the opinion expressed by the doctor during the cross-examination in the present case. In the present case, it was not possible for the trial Judge to link the accused with the crime on circumstantial evidence also especially when no injury was found on the genital organs of the accused No.1 and absence of semen on the lungi put on by accused No.1 at the time of commission of offence. During the course of submissions, Mr. Anandjiwala has drawn our attention to the observations made by the Apex Court in the case of **Surjit Singh and another v/s State of Punjab, AIR 1994 SC 110.** In the cited decision, evidence of P.W.6 was

found to be of great importance in connecting the appellant with the crime. The Apex Court, after careful scanning of the evidence, has observed that the conduct of the witness was highly unnatural. It is held that though it is not possible to call that witness as entirely a false witness, but in absence of any other corroborative evidence, it is unsafe to accept the evidence of that witness and to convict the accused. In the present case, according to ld. Counsel Mr. Anandjiwala, the ld. Trial Judge has made detailed exercise before recording a finding that it is not safe to accept any of these three witnesses as an eye witness to the incident or a person telling truth and only truth before the Court. Veracity of a witness requires to be brought on the touch-stone keeping all parts of appreciation of evidence in mind and unless it is possible to accept that the facts stated by these witnesses are nothing but truth, it is not safe to rely on such part of evidence. It is true that in the incident the offender has committed a ghastly act of rape and either incidentally or because of ruthless behaviour of the offender, a girl aged about 14 years has been murdered. The Court has rightly found that the death of Farida is homicidal death amounting to murder, but

simultaneously held that it is not possible, on given set of evidence, to hold that the accused persons responsible for the wrong committed.

10. We have appreciated three major aspects brought to our notice by ld. Counsel Mr. Anandjiwala; viz;

(i) The witnesses have made vital improvements in their version and they attempted to give go-bye to the theory placed by the prosecution as to how Farida was killed;

(ii) Their conduct when they were allegedly seeing/visualizing the incident when not under actual threat given to any of these three witnesses, is highly unnatural and uncommon to a human being. In the present case, out of three eye witnesses, two witnesses were friends of the person being victimised before them because the story of the prosecution is that after the incident, these witnesses were given threats, but it was not impossible for them to shout collectively for help and these three witnesses i.e. Johra, Nafisa and Rupchand could have rushed to the spot where Farida was being victimised. Rupchand is shown to be a young boy of about 18 years of age and he was grazing cattle. So,an able-bodied young boy could have helped these two girls in

saving their friend i.e. victim girl Farida. Non-response to even persuasion by their relatives when they were back to their house, is found unnatural. AT least, they could have disclosed before the PSI that they had seen the incident. The mob of village people was very well there in search the girl Farida during that very night. The mob could have been taken to the spot. So, the ld. Trial Judge has rightly observed that it is not safe to accept the say of the accused persons that these three prosecution witnesses or any one of them has visualized/noticed the actual commission of offence. The version of the prosecution is contradictory as to the mode in which the deceased was strangulated. The opinion of the doctor runs contrary to the story placed by the prosecution.

(iii) An attempt made by the Investigating Officer to pursue one of the accused to become a star witness to the case placed by the prosecution, should be viewed with suspicion. The ld. Trial Judge has not made any comments on it, but haste made in recording confessional statement of accused No.2 by Investigating Agency or by ld. Chief Judicial Magistrate has affected badly to the case of the prosecution and the ld. Trial Judge therefore, has rightly rejected the arguments advanced by ld. PP before

the trial Court that confessional statement of accused No.2 is of any help to link any of these two accused with the crime.

(iv) In reference to the statement of accused No.2 recorded under section 164 of CrPC i.e. exh.47, the ld. Trial Judge has made detailed discussion and has held that the statement can not be used legally because of serious legal infirmities. For the sake of convenience and brevity, we would like to reproduce relevant part of the judgment of the ld. Trial Court in this regard:-

> " Now, it is submitted by the learned Addl. P.P. Shri Parmar, that the said statement of the accused No.2 Exh.47 is a confessional statement and it falls under the provisions of section 164 of Cr.P.Code and hence it requires to be used and considered against both the accused. So, the material point is as to whether that statement of accused Exh.2 Exh.47 is such as can be said a confessional statement of the accused No.2 or not. As I stated herein above, when that statement was recorded by the learned Chief Judicial Magistrate Bharuch Shri R.C.Parmar, as per the provisions of Section 306 of Cr.P.Code after accused No.2 accepted the pardon, it can not be said that that can be recorded under section 164 of Cr.P.Code, as a confessional statement. However, even if we believe for the sake of arguments hat the statement Exh.47 was recorded under section 164 of Cr.P.Code, it amounts to a confessional statement then it is necessary to see as to whether that statement is recorded in accordance with the required provisions of law or not. It is mandatory provisions as laid down in Section 164(4) of Cr.P.Code that a certificate stated therein requires to be given by the learned Magistrate below such confessional statement. In the instant case, it is admittedly clear that the learned Magistrate has

not given such certificate below that statement Ex.47 as required under Section 164 of Cr.P.Code. It is a well-settled position of law if the mandatory provisions of Section 164(4) of Cr.P.Code are not complied with then such confessional statement becomes illegal and inadmissible in evidence. It is also very clear from the evidence on record that the statement Ex.47 is recorded after administering the oath to the accused No.2. It is a well settled position of law that if the oath is administered to the accused, for recording such confessional statement under Section 164 Cr.P.Code, it is clear that such statement becomes illegal. So, if we consider such facts and circumstances, it can not be said that that statement Ex.47 is recorded by the ld. Magistrate by observing the due mandatory and requisite provisions of law. So, in my view, the statement Exh.47 does not carry any evidentiary value from that point of view. So, in my view, the statement Ex.47 of the accused No.2 can not be acted upon or relied on against the accused in a case like this. ...”

According to us, the above finding of the ld. Trial Judge is absolutely in accordance with law.

11. It is true that the Apex Court has said in the case of **State of U.P. v/s Krishna Gopal and another, AIR 1988 SC 2154,** has observed thus:-

“ ....A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case.

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To

> constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case."

However, on facts, the observations made by the Apex Court in the above-cited decision, would not help the prosecution. In the same way, the decision of the Apex Court cited by ld. APP Mr. Gohil for the State in the case of **State of U.P. v/s Anil Singh, AIR 1988 SC 1998,** also would not be applicable on facts because the facts of the cited decision are materially different than the present one. The Apex Court has observed as under:-

> " In an appeal against acquittal the Supreme Court observed that in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that

> there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

12. The distance between village Kharod and the the spot from where the dead body was found or the place where this girl had gone to collect the cow-dungs if considered, the death of Farida must have been caused much prior to the arrival of Johra and Nafisa in Baniavagha when they had allegedly visited second time said place to collect the cow-dungs. It is not on record to show that till they reached to the spot and visualized the incident, whether any cow-dung was collected by these two or not?, what happened to their baskets ?, when they returned under fear ? are the important circumstances to be explained by the prosecution. However, the prosecution witnesses have not said anything in this regard and obviously therefore, no cross-examination on these points was also made. A person who is taking

livestock i.e. cattle with him, obviously would reach late to the village than a person who practically starts running under fear to reach to the village. However, an attempt is made to show that these three witnesses had seen the incident from one spot and they had jointly returned to the village. Two girls went to their respective home and third one i.e. prosecution witness Rupchand went to his master's house. Undisputedly, when Suraiya and Nafisa had attempted to find out Farida, it was practically dark and, therefore, both of them had returned. Considering the actual time of sunset, it appears that village people with Nafisa must have searched Farida at any time between 7.00 & 7.30 p.m. The complaint is lodged at Ankleshwar Police Station at 21.45 hours i.e. about 9.45 p.m. on the same day. The distance between Ankleshwar and village Kharod has come on record and one can reach Ankleshwar within 10 to 15 minutes. So, after locating the body within two hours, the complaint was lodged. It was not impossible for village people to take Nafisa and Johra at Ankleshwar Police Station as girls who had been to Baniavagha area for collecting cow-dungs if all the three had really gone even on 2nd occasion for the same purpose. On the contrary, it is possible to infer reasonably that none

of these two girls had gone second time to collect the cow-dungs and as Farida had not returned for a reasonable long period, Suraiya might have been informed and exercise to find out Farida must have been delayed. Thereafter, the brother of Farida and Suraiya were informed that the lonely girl in Baniavagha area i.e. a grazing field has been victimised by the offenders. It is rightly argued that even there is a contradiction as to the presence of the accused in that very area itself, in the evidence led by Nafisa and Johra at one end and Rupchand on the other. It is said by Nafisa and Johra that the accused persons were there and they had conversation when they had visited first the area for collecting the cow-dungs at 3.00 p.m. and version of Rupchand is that when he saw girls for the first time at about 3.00 p.m., the accused persons were not present there. It is also relevant to note that it is in evidence that two other cattle-grazers were very well there in that Baniavagha area. There is no exact evidence as to the width and length of that area viz. grazing field, but in view of the map drawn by the Circle Inspector and in view of the nature of evidence led by him, it is possible to infer that shouts of three young persons could have helped them and they ought to have availed that

opportunity of shouting because the accused while committing offence, were at a reasonably good distance and that too in the Khadi area and so the witnesses were practically on a higher pedestal than the accused persons. Hence, the ld. Trial Judge, while not accepting the version of these three witnesses, appears to have appreciated all aspects which can be said to be relevant.

13. In view of above discussion, we accept the submission of ld. Counsel Mr. Anandjiwala for the respondents accused that the reasons assigned by the ld. Trial Judge for acquitting the accused are sound and there is no error or perversity or patent illegality in appreciating the evidence. It was not possible for the ld. Trial Judge to link the accused No.1 with the offending act on the ground of false or inadequate explanation as to injury of teeth bite marks on his fore-arm because this solitary circumstance even if can be said to be incriminating circumstance against accused No.1, is not sufficient to link the accused No.1 with the crime. False or inadequate or unsatisfactory explanation can be used against the accused, but it provides additional link. The basic principle is that the case of

the prosecution should stand on its own legs and the accused is supposed to explain satisfactorily the incriminating circumstances against him.

14. The reasons recorded by the learned Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas v. State of Haryana, reported in (2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kanshiram v. State of Madhya Pradesh (Re.Para-21), reported in AIR 2001 SC 2902,** in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse. In view of the ratio of the above cited decision, there is no merit in the present Revision Application and the same is required to be dismissed.

15. Before parting, with heavy heart, we observe that some more investigation and some more questions to the Doctors, probably might have brought some good result

for prosecution qua the guilt of accused No.1. Acquittal whether is a clean acquittal or is based on benefit of doubt, becomes irrelevant when this Court is dealing with the acquittal appeal.

15. For the reasons aforesaid and adopting the reasons assigned by the ld. Trial Judge, we hold that there is no merit in the present Criminal Appeal as the prosecution has failed to establish the guilt against the respondents accused. Hence, Criminal Appeal is dismissed. The impugned judgment and order of acquittal dated 24.12.1985 passed by ld. Addl. Sessions Judge, Bharuch in Sessions Case No. 3/1985 acquitting the respondents accused from the offences punishable under sections 302, 376 & 114 of IPC, is hereby confirmed. The respondents accused are on bail, their bail bonds stand discharged.

(C.K. BUCH, J)

(K.A. PUJ, J)

*rawal